Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-172

HUBERT MORELOCK, EUGENE BORGERDING, WILLIAM EVANS, CLAYTON METCALF, AND RALPH SAUNDERS,

Petitioners,

vs.

THE NCR CORPORATION,

Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN B. HUBER

1520 Marsetta Drive
Dayton, Ohio 45432
(513) 429-0577

Counsel for Petitioners

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1480

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I. FINALITY

Respondent asserts that Supreme Court Rule 19 requires a "final appealable order" prior to a successful invocation to this Court to grant jurisdiction. It plainly does not so provide. That the rule might have so stated in 1928[1] and 1925[2] is no response to the applicable statement

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[1] *Slaken* v. *O'Connor*, 278 U.S. 61 (1928)

[2] *Gulf Refining Company* v. *U.S.*, 269 U.S. 125 (1925)

of Rule 19 as contained in the current Supreme Court Rules.

Respondent's citation and notions of "no perishable constitutional issue" wherein Writ of Certiorari was sought (and granted) [3] to review the judgment of a state supreme court under 28 U.S.C. sec. 1257 is likewise inapposite to this case wherein review is sought of a federal appellate court's decision, now in conflict with two other Circuit Courts of Appeal.[4]

Moreover, Respondent's own citation of the *North Dakota Pharmacy Board* decision[3], itself provides reference to three separate instances wherein remand for further proceedings below in state court, did not deprive those petions for Certiorari the required "finality" even under 28 U.S.C. sec. 1257[5], which did require "finality".

Of the seven (7) further citations asserted in support of Respondent's "Finality" argument, (Respondent's Brief in Opposition p. 6), none are applicable.

Three of the decisions involve attempted Writs to the State Supreme Courts of Florida[6], Missouri[7], Kansas[8], and a fourth involved an attempted Writ to the then Supreme Court of the Territory of Dakota[9].

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[3] *North Dakota State Board of Pharmacy* v. *Snyders Drug Stores, Inc.*, 414 U.S. 156 (1973)

[4] *Pons* v. *Lorillard*, 549 F. 2d 950 (C.A.4) (certiorari granted 5-27-77), 45 U.S. Law Week 3840; *Rogers* v. *Exxon*, 550 F. 2d 834 (C.A. 3)

[5] *Hudson Distributors, Inc.* v. *Eli Lilly and Co.*, 377 U.S. 386; *Local No. 438* v. *Curry*, 371 U.S. 542; *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555

[6] *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413 (1915)

[7] *Haseltine* v. *Central National Bank*, 183 U.S. 130 (1901)

[8] *Rice* v. *Sanger*, 144 U.S. 197 (1892)

[9] *Smith* v. *Adams*, 130 U.S. 167 (1889)

The fifth involved an attempted direct appeal from a district court under then Section 238 of the Judicial Code.[10]

The sixth citation is to an ancient decision of 1899, when the applicable Supreme Court rule did impose the condition of "finality", this in contrast with present Rule 19, which does not.[11]

The seventh citation involved an issue of timely filing of Petition for Certiorari within the 90 day period, the Court holding that in absence of service of a notice of entry of judgment per Federal Appellate Rule 36, the judgment below was not "final" for purpose of starting the 90 day clock.[12]

II. LORILLARD v. PONS, ALREADY BEFORE THE SUPREME COURT

Petitioners have already asserted several substantive reasons why this case should not be merely held in abeyance but instead accepted either for independent review or for concurrent review and argument with the already accepted *Lorillard* case from the Fourth Circuit.[13]

To these substantive reasons, Respondent makes no reply save the naked assertion that in the *Lorillard* case, . . . "the issue is better presented".

To us, the most telling of the reasons favoring issuance of the Writ lies in the Sixth Circuit's advance announcement made at the time of denying the petition for rehearing, that the Supreme Court's decision in *Lorillard* alone, will not resolve the conflict, viz., that even in the wake

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[10] *Wilson* v. *Republic Iron and Steel Company*, 257 U.S. 92 (1921)

[11] *U.S.* v. *Krall*, 174 U.S. 385 (1889)

[12] *Scofield* v. *National Labor Relations Board*, 394 U.S. 423 (1969)

[13] Petition for Writ, *Morelock et al.* v. *NCR Corp.*, pp. 10, 11

of the Supreme Court's sustaining the right to jury trial in *Lorillard,* the *Morelock* jury will persist as an advisory one, given the allegedly distinguishing element, the joinder of multiple equitable claims for relief in *Morelock.*

III. A QUESTION OF SUBSTANCE

Respondent urges that a question of substance is presented only when the Supreme Court is in a position to finally resolve the issue of "who wins and who loses". Were that the case, remand from the Supreme Court back to the circuit courts or trial courts for further proceedings would never occur, as it most frequently does.

To the degree this specious "ultimate outcome" argument is relevant to the question of whether Writ should or should not issue, we observe that a jury verdict of liability has already been returned in this case against the Respondent.

The "ease" with which that verdict may be ignored as the work of an advisory jury, turns to "consummate difficulty" upon acknowledgment of jury trial as a matter of right.[14]

Respondent's citation, *F.T.C.* v. *American Tobacco*[15], was in fact accepted for review. The Circuit Court's decision was affirmed upon that review in keeping with the "rule of non-interference where conclusions on a matter of fact depend on appreciation of circumstances which admit of different interpretations." 274 U.S. 543, 544.

The troublesome *fact issue* in that case was whether the defendant "became party to the unlawful combination of

[14] See *Sentilles* v. *Inter-Caribean Shipping Corp.*, 361 U.S. 107, 4 L.ed 2d 142, 80 S. Ct. 173

[15] *F.T.C.* v. *American Tobacco Co.*, 274 U.S. 543 (1973)

tobacco jobbers at Philadelphia to maintain prices?" 274 U.S. 543, 544.

In stark contrast, the issue at hand in *Morelock* is Constitutional, not factual. The *Morelock* decision, moreover, has created a conflict with two Federal Circuit Courts of Appeal on that very Constitutional issue.

NLRB v. *Pittsburgh S.S. Company*[16] likewise was an instance wherein the review of fact issues were held to be left normally and primarily to the Circuit Courts of Appeal under the express Congressional direction in Taft-Hartley, sec. 10 (e), 61 Stat. 148, 29 U.S.C. (Supp. III) sec. 160 (e). Respondent's citations involve neither a Constitutional issue nor a conflict among the Circuit Courts of Appeal.

IV. CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL

Respondent seemingly urges at page 8 of the Brief in Opposition that right to trial by jury varies whether age discrimination is imposed under the mechanism of a pension plan versus the mechanism of a non bona fide seniority system and thereby attempts to absolve the Third Circuit's *Roger's decision* of any conflict with *Morelock.*

The *Lorillard-Morelock* conflict is absolved in equally superficial fashion by failure to perceive the obvious contradiction between the Sixth Circuit's rendering of the *Morelock* jury's verdict to the nothingness of an "advisory finding", with the Fourth Circuit's grant of jury trial as a matter of Constitutional right.

[16] *NLRB* v. *Pittsburgh S.S. Company,* 340 U.S. 498, 502 (1951)

CONCLUSION

Because of the decision's clear conflict with *Pons* v. *Lorillard,* 549 F. 2d 950 (C.A.4) (certiorari granted 5-27-77, 45 U.S. Law Week 3840); its clear conflict with *Rogers* v. *Exxon,* 550 F. 2d 834 (C.A.3); and the very real prospect that a decision in that already accepted 4th Circuit case will not resolve the entire conflict now clouding relief under the Age Discrimination in Employment Act, the Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals should be granted.

Respectfully submitted,

JOHN B. HUBER

1520 Marsetta Drive
Dayton, Ohio 45432
(513) 429-0577

Counsel for Petitioners